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No. 10-653

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PSKS, INC. D/B/A KAY'S KLOSET...KAY'S SHOES,
Petitioner,

v.

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Three mischaracterizations pervade the Opposition. First, Respondent claims Petitioner seeks to revisit *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007). Opp. 4. Untrue. Indeed, the Petition's author has publicly opined that *Leegin*'s rule-of-reason standard was correct. Elhauge, *Harvard, Not Chicago*, 3 COMPETITION POLICY INTERNATIONAL 59, 60-68 (Autumn 2007). This Petition concerns more general legal conflicts about how to define markets, infer market power, apply the rule-of-reason, and find horizontal agreements. Many of these conflicts long pre-date *Leegin*, and all of them extend across antitrust law well beyond vertical price-fixing.

Second, Respondent falsely asserts the complaint alleged no interbrand harm. Opp. 2-4, 7, 18-19, 22. This assertion simply ignores the complaint's allegation – quoting a defendant document – that the horizontal agreement to limit discounts applied to *all* "merchandise in [each retailer's] store" and included "everything not only Brighton." Pet. 4, 33, 37a. The alleged conspiracy thus restricted discounts on all brands and was plainly interbrand. Such a horizontal conspiracy to limit discounts is *per se* illegal. *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 648 (1980).[1]

Third, Respondent erroneously claims there is no conflict in legal standards, but only a dispute about the application of legal standards. Opp. 2-3. Actually, the Petition demonstrates pervasive conflicts over the legal standards that the Fifth Circuit applied to undisputed allegations, as the following details.

I. THE CONFLICT ON MARKET DEFINITION AND POWER

A. The Conflict About Single-Brand Markets

Respondent argues that, because the Fifth Circuit admitted single-brand markets could exist "in rare circumstances," Petitioner merely claims the Fifth Circuit misapplied the legal standard. Opp. 11. However, Respondent omits that the Fifth Circuit's next sentence limited this possibility to lock-in cases. Pet. 6. The objection is not to the application of this lock-in test, but rather that this test, which Respon-

[1] Further, Respondent admits the Complaint alleged that widespread manufacturer use of similar price restraints did "limit interbrand competition." Pet. 5.

dent never defends, conflicts with other circuits' legal standard.

Respondent argues that five circuit decisions failed to find a single-brand market. Opp. 8-9. However, the legal question is not whether the specific brands addressed in other cases were separate markets, but rather what standard to use to judge when brands constitute separate markets. Respondent ignores the legal standard applied by those circuits and thus offers no rebuttal to Petitioner's showing that they used a conflicting legal standard. Pet. 8-9. By Respondent's logic, if all circuits used the same legal standard, and case-facts happened to meet it in some circuits but not others, we would have a conflict. Nonsense. Petitions for certiorari concern conflicts in legal standards, not conflicts in outcomes.

Moreover, Respondent's outcome-based argument fails because three other cases *did* find a single-brand market. Respondent attempts to distinguish two cases as involving two merging firms in markets described by characteristics rather than brandname. Opp. 9-10. However, by establishing market definitions applicable to only a single brand post-merger, both cases necessarily rejected the Fifth Circuit standard barring single-brand markets absent lock-in. Both cases also held that the SSNIP test is the correct legal standard, which the allegations plainly met. Even if description trumped economic reality, the Brighton market could equally be called the "head-to-toe coordinated accessories" market because only Brighton has that characteristic. Pet. 2. Respondent argues the third case was a *per se* case, but the court found market power relevant to inferring an agreement and concluded single brands had market power without any lock-in. Pet. 8-9.

Respondent argues that because *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992), involved lock-in, its holding must be limited to lock-in cases. Opp. 10. However, *Kodak*'s reasoning was not limited to lock-in cases; instead, it held single-brand markets appropriate whenever other brands were not "reasonably interchangeable," citing many cases that found single-brand markets without lock-in. Pet. 9-12. Respondent claims these other cases didn't involve single-brand markets, Opp. 10-11, but this Court held that they did. Pet. 10.

Respondent asserts that the Fifth Circuit standard does not conflict with the reasonable interchangeability test. Opp. 10. But the cases clearly hold that *reasonable* interchangeability turns on cross-elasticity, and the Complaint met that test by alleging "little cross-elasticity of demand." Pet. 2-3, 11-12. The Fifth Circuit ignored this allegation because its legal standard required lock-in, meaning a *total* lack of interchangeability, rather than the lack of *reasonable* interchangeability that is the correct test.

Respondent asserts it is "indisputable" that various brands are highly interchangeable, making the market highly competitive. Opp. 3, 11. But that is precisely what is disputed, and Respondent tellingly cites no support for its assertion. At this stage, courts must assume Petitioner can prove the allegation that actual consumers exhibit little demand cross-elasticity. Courts cannot reject such proof based on blithe defense lawyer suppositions that consumers should be just as happy with other brands. That would violate the fundamental antitrust premise of consumer sovereignty by second-guessing the consumer preferences revealed by their actual demand cross-elasticity.

Respondent falsely asserts that all Petitioner alleged to support a single-brand market is that Brighton is "distinctive" and "unique." Opp. 11-12. Actually, Petitioner also alleged low cross-elasticity, demand inelasticity, and facts satisfying the SSNIP test. Respondent's argument that Petitioner claims "every brand" is a monopoly is thus a straw man. Opp. 12. Petitioner claims only that the Fifth Circuit holding that single-brand markets can *never* exist without lock-in conflicts with other circuits that correctly examine actual economic evidence on consumer substitution.

B. The Conflict About Wholesale Markets

Respondent argues the Fifth Circuit correctly rejected a wholesale market because the relevant market is retail. Opp. 14-15. However, *Leegin's* references to manufacturer market power clearly meant to include manufacturers who operate only at wholesale, who can have only wholesale market power, which *Leegin* held relevant to manufacturers' power to induce retailers to exclude rival products. 551 U.S. at 894, 898. Such manufacturer market power may not be relevant to all anticompetitive theories – another strike against making it an absolute screen – but *if* manufacturer market power is legally relevant, it is properly assessed at the wholesale level.

Moreover, Respondent's argument that manufacturer market power should be assessed at retail was *not* the basis for the Fifth Circuit's decision – it rather held that a "relevant market definition must focus on the product rather than the distribution level." Pet. 13. It did not limit its holding to vertical price-fixing or hold that Petitioner focused on the wrong distribution level. It held that product market

definition cannot focus on the distribution level at all, which plainly conflicts with many other circuits. Pet. 13-15.

Respondent admits the Ninth and Tenth Circuits found a wholesale market, Opp. 14, which suffices to demonstrate a conflict. The conflict with the Third and Eighth Circuit decisions sustaining wholesale markets is not altered by Respondent's claim that their market analysis was not "detailed." Opp. 15. Respondent argues that three other circuits rejected wholesale markets. Opp. 14-15. But the Sixth Circuit held (contrary to Fifth Circuit) that wholesale and retail markets were separate, and its reasoning that retail was relevant because the defendant operated there dictates the opposite conclusion here. The D.C. Circuit held only that it was too late in the proceedings to separate the wholesale market, not that wholesale markets never existed. The Eleventh Circuit rejected a wholesale market due only to insufficient evidence, after acknowledging that markets could be defined by distribution level.

Respondent's argument that independent issues justified market rejection ignores Petitioner's rebuttals and the Fifth Circuit's actual holdings. Respondent incorrectly claims the Fifth Circuit held the allegations failed to justify limiting the market to "brand-name" products. Op. 13. Actually, it held the allegations failed to show *Brighton* was not interchangeable with non-brandname products, which duplicates the above conflict because Brighton's low cross-elasticity with *all* products indicates even lower cross-elasticity with only non-brandname products. Pet. 14 n.2. Respondent also incorrectly asserts that Petitioner's "only" argument against the Fifth Circuit's holding that barred limiting the market to sales

to independent retailers is that Respondent preferred to sell to them. Opp. 13. The actual basis for this Fifth Circuit holding was that independent retailers might compete downstream with other retailers, and Petitioner both rebutted this downstream focus and showed that consumers do not find other retailers a reasonable substitute. Pet. 14. Finally, Respondent mistakenly asserts that "Petitioner does not challenge at all" the Fifth Circuit's conclusion that "'women's accessories' is too broad and vague" to constitute a market. Opp. 13-14. Actually, Petitioner directly challenged this conclusion and rebutted the Fifth Circuit's rationale that the market was simply too big for one firm to have market power in it. Pet. 15-18.[2]

C. The Conflict on Direct Proof of Market Power

Even if the market definitions were lacking, direct proof of market power was alleged. Respondent argues that pleading "product differentiation," "demand inelasticity" and "low cross-elasticity" is insufficient. Opp. 20. But that was not the basis for the Fifth Circuit decision. Instead, it held that market definition was absolutely necessary, 615 F.3d at 417, and one firm could not possibly have market power in a large market, *id.* at 418-19. This follows prior Fifth Circuit precedent holding that market power cannot

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[2] Respondent's substitute rationale that women's accessories improperly groups together non-interchangeable products fails because the relevant interchangeability is by retailers, not consumers. What retailers value is the profitability of the accessories they carry, with profits on one interchangeable with profits on another, and at wholesale there are clear economies to grouping accessories together.

be directly proven, which the Sixth Circuit *expressly* noted conflicts with other circuits. Pet. 16-17.

Moreover, the allegations were more than sufficient. Any contrary holding would conflict with a recent Eleventh Circuit holding that precisely such allegations of low elasticities (missing there) would suffice. *Jacobs v. Tempur-Pedic International*, 626 F.3d 1327, 1338 (11th Cir. 2010). It would also be unreasonable to expect plaintiffs to allege precise elasticity figures before getting the discovery data necessary to calculate them. Further, Petitioner added allegations that a SSNIP would not cause consumer switching, which necessarily alleges the elasticities were low enough to make a 5% price increase profitable. Pet. 2-3.

Respondent argues that *du Pont* held a brand cannot have market power, Opp. 21, but in *Kodak* this Court already rejected that interpretation of *du Pont*. Pet. 11. Respondent also argues that conflicting cases did not involve vertical restraints. Opp. 21. However, *Toys "R" Us v. FTC*, 221 F.3d 928 (7th Cir. 2000), clearly involved vertical restraints. Most of the other conflicting cases involved monopolization claims, and if direct proof suffices to prove *monopoly* power, then it must prove mere market power. Respondent argues we don't have enough cases applying the market power requirement to vertical price-fixing, Opp. 22-23, but there is no sound reason why the standards for proving market power should differ for different antitrust claims, and Respondent gives none. Regardless, the Fifth Circuit approach of ignoring low elasticities conflicts with the opposite approach used in an Eleventh Circuit vertical price-fixing case. *Jacobs*, 626 F.3d at 1338.

II. THE CONFLICT ON A MARKET POWER SCREEN

Respondent argues that Petitioner waived the argument that anticompetitive effects could be directly proven, but Respondent is mistaken that Petitioner made "only" the quick-look claim that the agreement's existence sufficed absent a justification. Opp. 15. Petitioner also argued that, under standard rule-of-reason analysis, direct proof of anticompetitive *effects* obviates the need to prove market definition or power.[3] Indeed, the Fifth Circuit addressed this alleged direct evidence of anticompetitive harm. Pet. 19.

Later, Respondent admits the Fifth Circuit analyzed the alleged direct proof of anticompetitive effects, but wrongly argues that this eliminates any conflict. Opp. 17. This argument ignores the reality that the Fifth Circuit rejected the direct proof *because* it rejected market power. Pet. 19. Indeed, Respondent later states that "the Fifth Circuit was correct to require a showing of market power." Opp. 19. Requiring market power is precisely what creates the legal conflict even if Respondent believes it is on the correct side of that conflict.

Respondent distorts *Leegin*, claiming it held that proving higher prices does not establish an anticompetitive effect. Opp. 1-3, 17-18. That would be a revolutionary development, highly destabilizing to all antitrust law, and was not at all what *Leegin* held. Instead, *Leegin* held that showing higher prices did not alone justify *per se* condemnation because offsetting procompetitive effects might exist. 551 U.S. at

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[3] Respondent wrongly confuses this direct-effects claim with quick-look review. Opp. 16.

895-97. Here, Petitioner does not seek *per se* condemnation of vertical price-fixing and has specifically alleged the absence of procompetitive effects.

Respondent disputes any conflict, asserting falsely that various cases actually required market power. Respondent misquotes the Second Circuit as holding plaintiffs must "establish that the defendants possess the requisite market power," Opp. 19, which misleadingly omits the fact that the quoted sentence opened by saying this proposition applied only "where the plaintiff is unable to demonstrate such actual effects." *K.M.B. Warehouse v. Walker Manufacturing*, 61 F.3d 123, 129 (2d Cir. 1995). Similarly, Respondent misleadingly quotes the Eighth Circuit as holding market power must be proven, Opp. 19, omitting that the footnote to that sentence expressly stated that this proposition applied "unless the plaintiff can demonstrate an 'actual detrimental effect' on competition." *Ryko Manufacturing v. Eden Services*, 823 F.2d 1215, 1231 n.14 (8th Cir. 1987). The selectively omitted portions make each case mean the opposite of what Respondent claims. Respondent argues that the Ninth Circuit case involved a horizontal boycott rather than a vertical restraint, Opp. 19, but actually the court expressly decided *not* to treat the exclusive dealing agreements as a horizontal boycott. *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1445 n.1 (9th Cir. 1988).

III. THE CONFLICT ABOUT WAIVER

On waiver, Respondent argues that a party can present newly-relevant arguments, but not newly-relevant claims. Opp. 24-25. However, the legal claim here remains a Section 1 violation, the same as before; horizontality just affects the standards used to judge that claim. Respondent's logic would imply

Petitioner could also not make a rule-of-reason claim on remand because Petitioner could have raised such a claim before, which no one believes.

Respondent argues that some of the conflicting cases involved criminal defendants. Opp. 24-25. However, the rationale given in those cases is equally applicable here and was not grounded in criminal uniqueness. Pet. 24-26.

Moreover, many of the conflicting cases were civil. Respondent argues that the D.C. Circuit case involved a waiver on appeal rather than in the district court, Opp. 25-26, but at either stage the issue remains whether failing to raise an alternative ground constitutes a waiver. Respondent argues that the Sixth Circuit case involved an issue that "could not have been presented" before, but the court stated the issue was "an alternative ground on which its success *could* be based" in the prior proceeding. Pet. 27 (emphasis added). Respondent argues that various other civil cases involved arguments that were previously precluded by precedent, Opp. 26, but whether an argument can be waived when it is precluded or made irrelevant by precedent raises precisely the same issues about avoiding burdening the courts with unnecessary arguments about issues that are irrelevant unless the precedent is later overturned.

Finally, Respondent argues that two circuit cases favored its position on waiver. Opp. 25. However, Respondent ignores Petitioner's grounds for distinguishing the Ninth Circuit case it discusses. Pet. 28. The Fourth Circuit case involved a waived monopolization claim that *was* relevant in the first litigation. Even if these circuits did side with the Fifth Circuit, that just makes the conflict between those

and other circuits more extensive and heightens the need for Supreme Court review.

IV. THE CONFLICT ABOUT HORIZONTALITY

A. The Conflict Regarding Dual-Distribution Restraints

Respondent argues there is no conflict on dual-distribution restraints because all the cases ultimately applied the rule-of-reason. Opp. 27-28. This again confuses a conflict in outcomes with a conflict in standards. The conflict here is about the legal standard for deciding when to apply the rule-of-reason to dual-distribution restraints, and that conflict remains entirely unrebutted. A recent Eleventh Circuit decision makes clear that it continues to adhere to its noncategorical approach for assessing dual-distribution restraints when judging vertical price-fixing, *Jacobs*, 626 F.3d at 1340 n.15, thus raising a direct conflict even if one wrongly narrowed the focus to dual-distribution *price* restraints.

Respondent also notes that three of the circuits using a non-categorical approach relied on a 1981 Fifth Circuit decision that did so too. Opp. 28. That is true, but all that means is that the decision below implicitly overruled the Fifth Circuit's 1981 precedent.

B. The Conflict Regarding Agreements among Retailers

Respondent claims the horizontal allegations were dismissed under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). Opp. 29-30. However, the Fifth Circuit nowhere cited *Twombly* in its explanation for dismissing the horizontal allegations. 615 F.3d at 420-

21. The Fifth Circuit instead stated there was no alleged "agreement among retailers to *implement* the RPM policy." *Id.* at 420 (emphasis added). Given the clear allegations that retailers horizontally agreed on prices, the Fifth Circuit must have been requiring allegations that the price-fixing was *implemented* by the retailers, rather than through Leegin, which is precisely the conflict with other cases. Pet. 31-33. Moreover, Respondent's claim that Petitioner failed to allege "who, when, and where," Opp. 30, is absurd given that the Complaint alleged a horizontal inter-brand agreement to limit discounts that was reached by the specific retail dealers attending a January 2003 meeting in Hawaii. Pet. 37a.

Finally, Respondent claims there was no horizontal agreement because Leegin initiated RPM. Opp. 31. However, to say that Leegin initiated *some* form of RPM does not mean Leegin was the ultimate source of the RPM that was actually enforced, which was modified and heavily influenced by horizontal retailer agreement. Pet. 37a. Moreover, *Toys "R" Us* and *Interstate Circuit v. United States*, 306 U.S. 208 (1939), both found horizontal agreements even though the agreements were initiated by vertically-related firms. Pet. 33.

Respectfully submitted,

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